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Discussion Following the Speeches of Ambassador Esserman and Mr. Potter Section1: Canada and U.S Approaches to Free Trade Agreements - Canadian Speaker

Discussion

DISCUSSION FOLLOWING THE SPEECHES OF AMBASSADOR ESSERMAN AND MR. POTTER

DR. KING: Yes. I have a question for each of the speakers and Susan. I wonder whether there is a chance for more public participation in these Chapter 11 proceedings? That's a question to you. My question to Simon Potter is a little more broad.

To avoid all these personal animosities that you talked about, discourtesies, what about North American free trade court? Why not institutionalize the dispute resolution proceedings under NAFTA? Why not solve it long-term?

MR. POTTER: Madam Ambassador needs some time to formulate her answer, so I will take your second question first.

(Laughter.)

MR. POTTER: This has been noised about for five or six years now, as a way not only to avoid these animosities but also as a way to get a bit more precedential value into the judgments that are coming and as a way to avoid the difficulties, which you mentioned, Susan, about formation of panels, that is to have a permanent roster. I think it is probably something which is going to come one day as the economies do integrate.

But my assessment is that there is just no appetite for this kind of thing politically in the United States. In the United States, we already are facing allegations that it is unconstitutional to have panelists on a judicial review who are not American and the idea of creating some supranational court with a binding power on American agencies is not on. But would it be a good idea, Henry? I think it would be.

DR. KING: Susan?

MS. ESSERMAN: If I can just say on that point, I agree with what Simon is saying in terms of feasibility, but we can take some steps to professionalize the panel formation process. I think it is unacceptable and embarrassing – and the U.S. shares much of the blame – but Canada could do a lot more as well. We should fund it. And that's why I agree with much of what Simon said, and, of course, it is always interesting to me to see how much the Canada-U.S. relationship is looked at through the veil of lumber and understandably so.

Of course, it is not quite the same when we are talking about perceptions in the United States, but lumber and many other cases provide a reason for us to move together in a nonpolitical way. If we really want to do what you are saying, which is to restore order and rules and adherence to the rules, we ought to speak in a highly professional way between two countries, and let's professionalize, not politicize but professionalize Chapter 19. We will do it in

several ways. One, we will fund it because it is shameful we have made these commitments and we don't fund it. There is no excuse, and it is just embarrassing.

Number two, we have a roster that is ridiculous. Now, because of exemptions, people who have a lot of experience understanding antidumping and countervailing laws can't really participate and understandably so. We certainly don't want to go there because then we will have all sorts of ethics challenges.

And then we sometimes have questions raised about whether or not an ad hoc panel process is a good idea, and I understand this a bit from my own experience in Government, that sometimes when you have a panelist parachuting in on a single matter, the panelist may not have the best judicial temperament.

Now, I know many Canadians and some of my own colleagues don't like the idea of putting judges or former judges on the roster. I think it is a good idea, particularly given my experience having been an administrator of the antidumping and countervailing duty laws. What you want is professionalism. You want people who are used to judging and to being fair.

So, you ought to try to fill the roster with judges or former judges, retired judges. You ought to avoid conflicts but to get some of the benefit of the expertise, you might try to include on the roster people who have antidumping and countervailing duty experience from Canada, U.S., Mexico but who are no longer actively practicing in a law firm.

That would professionalize Chapter 19. We ought to have a stable list so that when a case comes before the panel is a roster to which to refer, and we avoid the delays, so we can get back to what the initial purpose was – expedition. 315 days. That's not just broken in lumber. It is broken across the board.

So I know that people are disparaging when you talk about modest measures. We would be well off if we made improvements just on these modest subjects. Otherwise, it would, in fact, be worthwhile for Canadian litigants to use the courts in the United States instead of Chapter 19.

MR. CUNNINGHAM: Michael Robinson had his hand up first, and then I will go to you next. That's you.

MR. ROBINSON: Thank you. Before putting my question, I would like to congratulate and thank Susan for talking about these retired practitioners. Having turned 65 on March 23rd this year, getting the benefit of reduced prices for films and public transit and everything, I now see another potential benefit that I can go on a roster.

I was nominated for –

MS. ESSERMAN: I forgot to add one thing. Maybe we should increase the pay.

MR. ROBINSON: Oh, yes, for sure.

As you remember and as Simon well remembers, having been challenged twice on his porky piggy cases, not only was that embarrassing enough, but his partners were really pleased of getting $400 a day in addition to suffering that sort of abuse.

This comment is just about a possible modest measure. Do you think either of you, or both of you, that there is any possibility of defining this extent of conflicts or non-conflicts for roster formation or even ad hoc panelist formation to some exemptions in like, thou shalt not automatically be deemed to be in conflict because one of your partners acted on a case involving this industry 20 years ago et cetera? Because it seems that the extraordinary challenge route, which is no longer extraordinary – it is used all the time in the U.S. – it seems whenever they don't like the result is based on allegations of conflict, and maybe that would be a modest measure, if we could just clean up somehow the definition of conflict. So do you think that would help as a measure?

MS. ESSERMAN: Well, I think in theory that's a good idea. In practice it is going to be hard to find agreement in the abstract I would say speaking based on my experience as USTR General Counsel and having been involved in the antidumping and countervailing cases, it might be hard to put that down in specifics, but I think we ought to look to the best conflict provisions that exist in other for a to see if we can get the best ideas. I certainly think it is a good idea and worth looking at it. It may be difficult to implement.

MR. CUNNINGHAM: Let's go next to Larry Herman.

MR. POTTER: I would just like to jump in there on this one. I think this is a problem. However, we don't have extraordinary challenges in every case. I think we are only up to our fourth, fourth or fifth, not much more than that, only fourth.

However, the example that you get out of extraordinary challenge cases, which raise ambitious and aggressive questions of conflict of practitioners, does have a follow-on effect, even in the other cases where there is no extraordinary challenge. I have to say I would be very, very reluctant to get into a case as a panelist in anything which comes remotely close to anything my 800 partners do. So it is a real problem.

MS. ESSERMAN: Yeah.

MR. POTTER: Also, if you have a system, which as you say, Susan, had the benefit of getting practitioners sitting on panels – and I like that idea – it is one of the reasons not to have the permanent court system, Henry – is that it is nice to have practitioners there who have a particular view and a knowledge of how these administrative agencies work.

And I think in the first several years it served Canada and the United States and Mexico extremely well. But if you have got a practitioner, you have to be understanding about what Americans call "issue conflict" because a practitioner is going to deal with all these issues at one time or another,

probably on both sides of every issue over the course of the practice, and if you have an ongoing conflict avoidance obligation, both retrospectively and prospectively, well, you disqualify all of your practitioners.

MR. CUNNINGHAM: I would just add that you are not going to see many U.S. practitioners, if any, going on panels now. Right after the last extraordinary challenge was launched, the lone U.S. practitioner panelist on the Wheat Board injury thing sent out a note saying "I think maybe not. I am getting out of here."

So, Larry?

DR. KING: This will be our last question. We have to make sure we keep our time schedule.

MR. HERMAN: I want to in the corridors, Dick, pursue this issue of retroactivity because I find it extraordinarily troubling. I mean, at the root of every decision, of every court is an element of retroactivity because you are adjudicating on a situation that took place before the judgment was rendered.

So every element of dispute has a retroactive portion to it. So I find this extremely difficult and an extraordinarily troubling notion, and it is at the root of the refusal of the U.S. Administration to return the softwood lumber –

MR. CUNNINGHAM: And I might say, before you go to your question, I would say one U.S. court judge in the CIT has agreed with you, and despite the no retroactivity provision in 129, he has taken the position that you can't have an administrative act, i.e. liquidation of the entries, done where that act is pursuant to an order which has been found to be invalid because the basis for doing the act under American administrative law principles has disappeared. Whether that will stand up in U.S. court, I have my real doubts, but at least one judge has had the courage to take that position.

MR. HERMAN: I did say I wanted to pursue that outside the hearing room here.

MR. CUNNINGHAM: Right.

MR. HERMAN: Here is the question, and it is addressed to Ambassador Esserman. There have been indications from U.S. practitioners in Washington that the attitude of the United States to Chapter 19 is, at least the United States Administration and perhaps this current Administration in particular, is hostile; that there is a concerted attack on Chapter 19, on its legitimacy and its ability to render disputes, the reason being that the U.S. would like to forget about Chapter 19, bury it, render it – when I say the U.S., I am talking in general terms – but there is the view that this Administration and elements in the Congress are totally hostile to Chapter 19, want to bury it, render it ineffectual, prove that it doesn't work, and that may be one of the reasons that Simon Potter mentioned the U.S. International Trade Commission made statements about a Chapter 19 panel, a legal NAFTA institution enshrined in U.S. law saying, in effect, that this panel, this panel had no right to decide as it did.

You know, I find that that is perhaps a reflection of that hostility of attitude in the Administration, not the Congress, in the Administration, in the institutions in the U.S. that seem to be attacking Chapter 19 with a view to ensuring that it never comes up again in future trade agreements.

What are your comments on that?

MS. ESSERMAN: Well, I would just say that they don't even need to do that to ensure it doesn't come up in future free trade agreements. Since NAFTA, there has never been a Chapter 19 included in a free trade agreement, and that was made clear in the next agreement after NAFTA. That's because, frankly, there would not have been political support for us to proceed with FTAA negotiations if Chapter 19 were included.

I would say that some are trying to do what you are saying. I don't justify any of this, and I think much of what has happened in lumber is unbelievably twisted and inconsistent with the underlying legislative purpose, but there is another thing going on, too.

U.S. resources are always minimal. U.S. officials don't have time to look at it. They don't give the kind of time that they should to professionalize it.

There isn't attention at the high levels to these professional issues, and I think that's why we need to move the discussion on to that ground and pull it out as much as possible from the political arena.

MR. HERMAN: That's why we need you here saying these things.

MR. CUNNINGHAM: And you also ought to be aware that among the administrations, among the agencies, there are differences in approach to this, and there was very recent quite dramatic approach on an issue called "zeroing" where Commerce sent the draft brief to a WTO panel, to USTR, and the brief – Commerce's typical massive passive, not-so-passive resistance to everything the WTO had previously decided – and at 6:00 p.m. on the Sunday evening before the brief was to be filed with the WTO on Monday, the chief Commerce lawyer gets a call from the USTR and says, "I got some bad news. We are not filing your brief. We are filing a different brief that essentially concedes the issue that you wanted us to so vigorously fight."

So there is – it is not a unified wall of anti-international body feeling in the U.S. Government.

MS. ESSERMAN: I would just say that you do see differences between the USTR and Commerce. And that's what he is reflecting because what is USTR's purported mission? It is negotiating the trade agreements and litigating in the WTO. I can just tell you they do look at things differently than Commerce. Commerce is looking in a much narrower vein, but certainly, there is the broad concern that you raised.

DR. KING: Well, do you want to conclude your hearing?

MR. CUNNINGHAM: I just want to thank all of you for being patient with us ranting here, and I think all of the rants are pretty well taken myself,

and it has been an honor for me to be on the panel with these two distinguished participants. And thank you, and we will see you, I hope, next year.

(Applause.)

DR. KING: I might add that we are running a little late as usual, and have a brief recess, but if you just want to stand in your chair, that's fine with me.

(Session concluded.)